

## LAW OPINION

What is next in *The Gambia v Myanmar*?

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ON 23 January 2020, the International Court of Justice (ICJ) in *The Gambia v Myanmar* delivered its order upholding The Gambia's request for provisional measures. On the same day, the

ICJ fixed 23 July 2020 and 25 January 2021 as the respective time-limits for filing of the Memorial by The Gambia and the Counter-Memorial by Myanmar. The procedural law of the ICJ, however, will allow the parties to pursue incidental proceedings side by side in different stages of the case until the final judgment. And, the result of some of the incidental proceedings may definitively determine the outcome of the case. This essay will shed light on such possible incidental proceedings that might follow in the aforesaid case.

**Preliminary Objections**

First of all, Myanmar may decide to go for filing preliminary objections challenging the jurisdiction of the Court and/or the admissibility of The Gambia's application. If Myanmar so decides, it will have to file preliminary objections as soon as possible, and not later than three months after delivery of The Gambia's Memorial (see Articles 79-79ter of the Rules of Court). For example, in *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* case, the ICJ fixed 1 February 2017 and 1 September 2017 as the respective time-limits for the filing of Iran's Memorial and the Counter-Memorial of the US. Later, the US on 1 May 2017, filed preliminary objections to the jurisdiction of the Court and the admissibility of the Application (see Order of 2 May 2017). Upon filing of the preliminary objections, the proceedings on the merits will be suspended. The ICJ delivers its decision on preliminary objections in the form of a judgment meaning that such decision becomes *res judicata*.

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**Intervention**

Any interested third state including Bangladesh may seek to intervene in *The Gambia v Myanmar* under Article 62 or Article 63 of the Statute of the ICJ as the case may be. If any third state considers that it has 'an interest of a legal nature' to protect in the aforesaid case, such state may apply to the Court for permission to intervene under Article 62 of the Statute before the closure of written proceedings. On the other hand, any state party to the Genocide Convention may file a declaration under Article 63 of the Statute seeking to intervene no later than the date fixed for opening of the oral proceedings on the grounds that construction of the said Convention is a matter in issue (see

Articles 81-86 of the Rules of Court).

The *Case concerning Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)* is the first case in the history, in which a state, i.e. Nicaragua was granted permission to intervene under Article 62 of the Statute (Judgment of 13 September 1990). In *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* case, the Court found the declaration of intervention filed by New Zealand under Article 63 of the Statute admissible (Order of 6 February 2013).

It should be mentioned that any states intervening under either Article 62 or Article 63 of the Statute do not ordinarily become parties to proceedings, nor are they invested with any rights or obligations attached to the parties. Such states are generally called non-party interveners. Any third state intervening under Article 62 of the Statute can become a 'party' when it has necessary consent to that effect from the parties to the case. A non-party intervener, under Article 62, will not be bound by the judgment of the case, nor will the judgment become *res judicata* for it. By contrast, a state intervening under Article 63 of the Statute will be bound by the Court's judgment



to the extent it relates to the intervention.

**Discontinuance**

The Gambia and/or Myanmar may notify, at any time before the final judgment on the merits, either jointly or separately, the ICJ that they have agreed to discontinue the proceedings. The Court will then pass an order recording the discontinuance and direct that the case be removed from the list. Alternatively, The Gambia, as the applicant, may unilaterally inform the Court in writing that it will not go on with the proceedings. In the latter case, the ICJ will follow the procedures laid down in Article 89 of the Rules of Court (see Articles 88-89 of the Rules of Court). In *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Nicaragua informed the ICJ that it had decided to renounce all further right of action and was not willing to continue with the proceedings. Since the US also indicated its acquiescence to Nicaragua's request for discontinuance of the proceedings, the Court removed the case from the list (Order of 26 September 1991).

The Rules of Court permit the contending state parties to discontinue a case as a result of out-of-court settlement. In *Case concerning Aerial Herbicide Spraying (Ecuador v Colombia)*, the ICJ

removed the case from its list after the Ecuador notified the Court that it had concluded a settlement agreement with Colombia, and that Colombia made no objection to the discontinuance of the case as requested by Ecuador (Order of 13 September 2013).

The *Case concerning the Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)* sets an example of joint decision taken by the contending state parties so as to discontinue an ICJ proceeding. The agents of Iran and the US jointly notified the Court that their governments had agreed to discontinue the case (Order of 22 February 1996). In *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* case, Timor-Leste decided to discontinue the proceedings in view of the fact that Australia's action of returning the seized documents had effectively ended the dispute between the two contending states (Order of 11 June 2015).

**Non-Appearance**

The Gambia or Myanmar may at any point of time decide not to take part in the proceedings of the case any further. This is popularly known as non-appearance. Non-appearance is

governed by Article 53 of the Statute of the ICJ. In *Fisheries Jurisdiction Case (United Kingdom v Iceland)*, Iceland never appeared before the Court. In *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, the US initially appeared before the ICJ, however, later refrained from taking part in the proceedings after the Court had decided that it had jurisdiction to deal with the case. In accordance with the ICJ's ruling in the foregoing case, a non-appearing party continues to remain a party to the case (provided that the Court has jurisdiction), and is bound by the judgment as per Article 59 of the Statute.

Lastly, the ICJ, either at the instance of the parties or *proprio motu*, may again indicate provisional measures, or revoke/modify the earlier provisional measures at any time in connection with the proceedings of *The Gambia v Myanmar* (see Articles 73-76 of the Rules of Court). The Rules of Court allows Myanmar to submit counter-claims in its Counter-Memorial, however, the factual background of the case does not seem to warrant such possibility (Article 80).

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## GLOBAL LAW UPDATES

## PROTECTING MIGRATORY SPECIES



'Gibi' the enchanting Great Indian Bustard, representing all the endangered species that need our love, care, and protection.



MANY animals – including birds, fish and mammals – migrate along set routes in search of food or breeding grounds. How best to protect them in a rapidly changing world is the focus of a major UN wildlife meeting which opened in Gandhinagar, India, on February 17, 2020.

The Thirteenth Meeting of the Conference of the Parties to the Convention on the Conservation of Migratory Species of Wild Animals, or CMS COP13, is taking place as the world faces the threat of losing one million species to extinction unless protective efforts are increased.

"COP13 comes at a critical time for wildlife conservation, with continued downward trends of habitat loss and species decline," said CMS Executive Secretary Amy Fraenkel.

COP13, which runs through 22 February, is being held under the theme "Migratory species connect the planet and together we welcome them home". These creatures bring multiple benefits to humans, such as seed dispersal and pollination, and provide economic benefits and jobs such as in the tourism sector, for example.

"These species move between countries without any passports or visas, but are messengers of peace and prosperity, and it is our responsibility to protect that," said Indian Prime Minister Narendra Modi in his keynote address. Delegates at the meeting will consider the need for guidance and other measures to mitigate the impact of roads, railways and other infrastructure on migratory species, which can injure or kill birds and other animals, increase pollution and cut through natural habitats.

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## FOR YOUR INFORMATION

## To reduce the inequalities gap

FOR the United Nations, the pursuit of social justice for all is at the core of the global mission to promote development and human dignity. The adoption by the International Labour Organisation of the Declaration on Social Justice for a Fair Globalisation is just one example of the UN System's commitment to social justice. The Declaration focuses on guaranteeing fair outcomes for all, through employment, social protection, social dialogue, and fundamental principles and rights at work.

The International Labour Organisation unanimously adopted the ILO Declaration on Social Justice for a Fair Globalisation on 10 June 2008. This is the third major statement of principles and policies adopted by the International Labour Conference since the ILO's Constitution of 1919. It builds on the Philadelphia Declaration of 1944 and the Declaration on Fundamental Principles and Rights at Work of 1998. The 2008 Declaration expresses the contemporary vision of the ILO's mandate in the era of globalisation.

This landmark Declaration is a powerful reaffirmation of ILO values. It is the outcome of tripartite consultations that started in the wake of the Report of the World Commission on the Social Dimension of Globalisation. By adopting this text, the representatives of governments, employers' and workers' organisations

from 182 member states emphasise the key role of our tripartite organisation in helping to achieve progress and social justice in the context of globalisation. Together, they commit to enhance the ILO's capacity to advance these goals, through the Decent Work Agenda. The Declaration institutionalises the Decent Work concept developed by the ILO since 1999, placing it at the core of the Organisation's policies to reach its constitutional objectives.

The Declaration comes at a crucial political moment, reflecting the wide consensus on the need for a strong social dimension to globalisation in achieving improved and fair outcomes for all. It constitutes a compass for the promotion of a fair globalisation based on decent work, as well as a practical tool to accelerate progress

in the implementation of the Decent Work Agenda at the country level. It also reflects a productive outlook by highlighting the importance of sustainable enterprises in creating greater employment and income opportunities for all.

On 26 November 2007, the General Assembly declared that, starting from the sixty-third session of the General Assembly, 20 February will be celebrated annually as the World Day of Social Justice. The 2020 theme for this day is "Closing the Inequalities Gap to Achieve Social Justice".

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## LAW VISION

## Membership in international sporting bodies and statehood

ARAFAT IBNUIL BASHAR

IN the case of *Reference re Secession of Quebec*, the Supreme Court of Canada observes that "the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states". However, as stated by Prof. Oppenheim, there is no settled view as to whether recognition is the only means of establishing a new state. The establishment of a state is to some extent dependable on its participation in the contemporary world affairs. Thus, membership in international organisations has become a feasible alternative mechanism of becoming part of the international community.

International organisations are usually created by states for engaging in the global regulation of any specific subject matter through co-operation. While membership in such organisations is a matter of politics just like recognition by a state, membership in international sporting organisations are comparatively easier. Like international organisations, sporting bodies regulates an important aspect of human activity, i.e. sports. When an entity participates in international sporting competitions, it acts like an established state, even though its claim of statehood may not be entirely undisputed. Though sports have not been beyond the touch of politics, sporting bodies have been more welcoming in accepting entities as members compared to other international organisations. This can be easily illustrated by the membership of FIFA, international football's governing body, which stands at 211, compared to UN, which stands at 193. In the case of the Olympics, 13 territories have Olympic committees recognised by the International Olympic Committee but are not members of the UN. In December 2014, Kosovo became a member of the International Olympic



Federation. The irony stands in the fact that Kosovo was able to participate in Olympic Games for the first time and earn its first ever gold medal in the Rio Olympics in Brazil, a country that has not yet recognised it. Two years later, Kosovo became the first non-UN member country to be admitted into UEFA and was also accepted by FIFA as its 210th member country. Palestine, which is an observer in UN, is a member of both FIFA and Asian Football Confederation and won the Bangabandhu Gold Cup, held in Bangladesh in 2018. And these are not the most glorious example of use of sports by an entity to make a place for itself in the international community.

Following the World War II, West Germany was quickly recognised by most states. The Soviet-occupied East Germany was recognised only by the Socialist Bloc. In seeking recognition from the international community, East Germany used participation in international sports. East German athletes competed, and excelled, in regional sporting competitions held amongst Socialist Bloc states and were gradually accepted in global sporting competitions. In 1965, the Olympic committee of the East Germany was recognised by the IOC and was allowed to participate in the 1972 Olympic Games taking place in Munich, West Germany. East Germany was then recognised by West Germany and subsequently by other states. Participation in sporting competitions led way to *de facto* recognition of East

Germany, which gradually lead to its *de jure* recognition.

On the other hand, entities like Northern Cyprus, Jersey have failed to make a place for itself in the sporting bodies, largely due to its total non-acceptance in the international community. It can be observed that in obtaining recognition by sporting bodies, recognition of Kosovo's independence by half of the world's states was an important factor. Both FIFA Statutes and the Olympic Charter define "country" as "an independent state recognised by the international community." And it was under this criterion that Kosovo received its membership. Even for East Germany, it had previous recognition from Socialist Bloc states. Thus, even to achieve membership in the sporting bodies, an entity must have the minimum amount of recognition in the international community.

Though membership in sporting bodies like IOC, FIFA, etc. cannot bear the same importance as membership in bodies like UN, EU or OIC, etc.; but in reality, they hold great practical significance. Sporting events like Olympics, World Cups attract billions of audiences worldwide. It is more likely that those sporting fans, which make up a significant portion of the international community, will accept an entity as state if it participates and performs in such events, rather than being approved in a meeting in Brussels or Geneva. Although membership in various sporting organisations and other international organisations may not conclusively establish an entity's position in the international community, in reality, such membership has almost the same political effect as recognition of states. Membership in sporting bodies has enabled states like Palestine, Kosovo to participate in global sporting events just like any other independent state.

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